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ABSTRACT

The Northwest Ordinance is noteworthy not only for its provision of stages of development and eventual admission of new states into the Union but also for provisions which protected civil liberties of the inhabitants. In the latter part of the ordinance there are six articles of "compact" that declare fundamental principles of liberty. Free exercise of religious faith, prescriptions for a fair system of criminal justice (such as trial by jury), no interference with existing contracts, protection of Indians, and prohibition of slavery are included in the Articles of Compact. Nathan Dane, a young congressional delegate, drafted the ordinance in its final form and included these basic liberties. The bills of rights in the state constitutions appears to have had the greatest influence on Dane in including these basic rights. A comparison of the ordinance and the state constitutions on civil liberties reveals striking similarities between the state constitutions and the ordinance. Article Six of the compact, prohibiting slavery, became significant as the controversy about the extension of slavery into the west persisted prior to the Civil War. In historical context, the articles on civil liberty expressed few new ideas but reiterated a cluster of already determined principles. Still, these articles are foundation stones in the structure of U.S. liberty. (SM)

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The Northwest Ordinance--
Our First National Bill of Rights

by Maurice Baxter

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Today the Northwest Ordinance of 1787 is best known for its plan of government in the frontier area north of the Ohio River--the stages of development and eventual admission of new states into the Union on a footing equal to the old ones. As significant as this policy may have been, it was not a novelty, because the Confederation Congress had repeatedly declared it ever since 1780. And though we applaud its liberalism, the fact is that three years earlier Thomas Jefferson's ordinance (passed but never put into effect) would have established a more democratic form of self-government for the territory.

The measure of 1787 is just as noteworthy for provisions which protected civil liberties of the inhabitants. In the latter part of the document, there are six articles of "compact" declaring fundamental principles of liberty, forever unalterable. Among several guarantees listed in this first national bill of rights are the following: free exercise of religious faith, prescriptions for a fair system of criminal justice (such as trial by jury), no interference with existing contracts, protection of Indians, and prohibition of slavery.

Nathan Dane, a young congressional delegate, drafted the Ordinance in its final form. This conservative lawyer from Massachusetts deserves primary credit for including a declaration of basic liberties, strangely lacking in Jefferson's version. What sources did he use? Obviously, centuries of Anglo-American experience furnished guidelines. There was his sure understanding of the common law in England and colonial America, of English constitutional documents

from Magna Charta of 1215 to the Bill of Rights of 1689, of ideas of natural law expounded by philosophers and invoked by leaders of the Revolution. In all these, he could find ample authority for limiting governmental power and for shielding inalienable rights. Perhaps most influential were the bills of rights in state constitutions, framed during the preceding decade. A suggestive point is the clause in the Ordinance requiring territorial officials to draw from laws of the thirteen states for their first-stage government.

A comparison of the Ordinance and the state constitutions on civil liberties is revealing. The first of these to be adopted was that of Virginia. Drafted by George Mason in June 1776 and representing Jefferson's views as well--soon broadly expressed in the Declaration of Independence--this state's declaration of rights became a model for a number of other states. One finds in it most of the guarantees of the Ordinance. In addition, it protected freedom of the press, ensured compensation for property taken by eminent domain, and forbade excessive bail and unwarranted search. Four years later, Massachusetts adopted a constitution with a bill of rights, mainly the handiwork of John Adams. More detailed than that of Virginia, but resembling it, Adams' document added clauses on rights to bear arms, to petition the legislature, and to be free of retrospective criminal statutes. He included more than Mason about the nature and scope of government, including principles of separation of powers and an independent judiciary.

So there were similarities in the Ordinance and most state

constitutions, though Dane was doubtless more affected by the laws of his own state. In each of them, for example, a common feature was the familiar pledge that life, liberty, and property must not be deprived except by the "law of the land," a rule found in Magna Charta and enduring as the immensely important due-process clause in modern American history. To possess and use property had always been regarded as a prime civil liberty.

After noticing the positive dimension of these early declarations, one must not overlook their silence on some highly valued rights of later years. Neither the Ordinance nor the state constitutions said anything about freedom of speech--that would become more meaningful after liberalization of the doctrines of libel and sedition. Nor did they prohibit the establishment of an official religion, nowadays a key part of our constitutional thought. "Free exercise" of religion, which was covered, did not have the reach of non-establishment, as the movement for the Virginia Statute of Religious Liberty (1786) would show.

We notice, however, a prominent innovation in the contract clause of the Ordinance: "no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts . . . previously formed." Dane seems to have intended to affirm the huge land grant obtained by the Ohio Company, an active venture of New Englanders at the moment. But the provision would have a much larger impact. It was borrowed by one of Dane's friends to be inserted into the new Constitution at the federal

convention currently sitting in Philadelphia. Throughout the 19th century, the Supreme Court would apply the contract clause as a formidable check upon state economic regulation.

A better-known part of the Ordinance's compact, Article Six, prohibited slavery. To be sure, Jefferson had proposed to do the same thing in his ordinance of 1784, but Congress had not approved. In light of persistent controversy about extension of slavery into the pivotal West until the Civil War, this article on slavery became quite significant. The Ordinance of 1787, reenacted by Congress under the Constitution two years later, set down a precedent which would often be useful to advocates of "free soil" in the territories. Within the Northwest itself, a sizeable southern-born population vainly tried to legalize slavery.

In historical context, the articles on civil liberty expressed few new ideas but chiefly reiterated a cluster of principles already settled. Still, they stand out as the first national declaration, four years before the Bill of Rights was ratified as amendments to the new Constitution. Along with other provisions on organizing the Northwest, these articles are foundation stones in the structure of American liberty.